In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 207

LOUIS H. ROSENBLUM, MAX STRYK AND JACOB WEISS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 102-106) is not yet reported. The opinion of that court on the prior appeal is reported at 176 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1950. (R. 106-108.) The petition for a writ of certiorari was filed on July 19,

1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether their acquittals on a conspiracy charge resulted in determinations favorable to petioners of facts essential to, and hence required reversal of, their convictions on substantive charges.

2. Whether the trial court erred in re-taxing costs.

STATUTES AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Criminal Code:

> Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.
> (18 U. S. C. 1946 ed., Sec. 88.)

Federal Rules of Criminal Procedure:

> Rule 36. *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

STATEMENT

On September 19, 1947, each of the petitioners was charged in a separate indictment with wilfully attempting to evade and defeat a large part of his income and victory tax for the calendar year 1943. (R. 10, 102-103.) In addition, a fourth indictment jointly charged all of the petitioners with conspiring to commit the substantive offenses. (R. 103.) Three of the overt acts alleged in the conspiracy indictment were that each petitioner filed a false and fraudulent tax return for 1943. (R. 11.)

The four indictments were consolidated for trial; a jury was waived; trial was had before the

court and a judgment of conviction was entered on each of the four indictments. Each petitioner was sentenced to three years imprisonment and a fine of $10,000 on the substantive charge and a further fine and imprisonment was imposed on the conspiracy charge. On appeal, the convictions on the three substantive indictments were unanimously affirmed, but the conviction on the conspiracy indictment was reversed by a divided court, 176 F. 2d 321. Petitions for a writ of certiorari were denied, 338 U.S. 893, rehearing denied, 338 U.S. 940. Thereafter, the Court of Appeals amended its order by directing a judgment of acquittal on the conspiracy charge, and such a judgment was accordingly entered by the district court. After commitment on the substantive charges, each petitioner filed in the trial court a motion to cancel void judgment and set aside illegal sentence (R. 9). Each motion was denied. (R. 64.)

The original judgments had ordered each defendant to pay one-third of the costs of prosecution of the four cases. The ascertainment of such fractional amounts was not made on the basis of the taxation of costs separately in each of the four cases. Instead, the clerk ascertained the costs reflecting the witness and marshal's fees and entered the same in the one case in which the three petitioners were charged with conspiracy. (R. 104.) In denying the motions referred to above the trial

court also entered the following orders re-taxing costs (R. 64-65):

> It is ordered that the items of costs taxed in the conspiracy case, No. 8832, as follows: Clerk's costs, $65.10 and the attorneys' fee of $20.00 are eliminated and cancelled; that the items aggregating $2,158.88 in said cause No. 8832, consisting of U. S. Marshal's fees of $126.38 and witness fees of $2,032.50, be retaxed as follows: one-fourth thereof is hereby retaxed as costs in No. 8832 and, in view of defendants' acquittal therein, defendants are relieved and discharged from any and all liability therefor.
>
> It is further ordered that the other three-fourths of said sum of $2,158.88 be retaxed as costs as follows: One-third of said three-fourths of said sum shall be retaxed as costs and added to the costs now taxed against each defendant in Causes No. 8829, 8830 and 8831.

Petitioners again appealed to the Court of Appeals which affirmed the orders of the District Court denying the motion of each petitioner to cancel the judgment of conviction against him, as well as the order correcting the taxation of costs. (R. 106.)

ARGUMENT

I

As the Court of Appeals rightly held on the prior appeal, and again on this appeal, the acquittal on the conspiracy charge does not warrant or re-

quire reversal of the convictions on the substantive charges. The crimes of conspiracy and of wilfully attempted tax evasion are not identical; nor are the substantive charges merged in the conspiracy. *Pinkerton* v. *United States,* 328 U. S. 640. The gravamen of a conspiracy charge is the agreement to commit unlawful acts (*United States* v. *Rabinowich,* 238 U. S. 78, 88); the gist of the offenses under Section 145(b) of the Internal Revenue Code, *supra,* was the wilful attempt to evade and defeat taxes. Moreover the opinions of the Court of Appeals show that the acquittal on the conspiracy charge was rested on the holding that statements and acts of the defendants, occurring after the termination of the alleged conspiracy, were inadmissible to prove conspiracy, although clearly competent on the substantive charges as admissions against interest by the particular individual making them. Any contention of inconsistency in result or of error on evidentiary matters could have been raised on rehearing in the Court of Appeals or on the petition to this Court on the first appeal.[1]

Sealfon v. *United States,* 332 U. S. 575 does not support the petitioners' contention. Since the

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[1] Indeed, in their prior petition, petitioners contended, *inter alia,* that

> The reversal by the Court of Appeals of the convictions on the conspiracy indictment automatically rules out the mass of evidence admitted into the Record solely because of the claim of conspiracy. Absent such testimony no evidence is left to support the convictions.

Petition in Nos. 368-70, 1949 Term, p. 15.

present case involves judgments entered at a single trial, no question of *res judicata* is here presented. Moreover, application of the doctrine of *res judicata* in the *Sealfon* case, foreclosing prosecution on the substantive charge after acquittal on a conspiracy charge, turned on the unique circumstances which prompted this Court to hold (p. 580) that the "basic facts in each trial were identical" and that the proceedings on the substantive offense constituted "a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent." No such identity of basic facts between the conspiracy and substantive charges exists here.

II

The re-taxing of costs by the trial court likewise provides no basis for the issuance of a writ of certiorari. After the original conviction on both the conspiracy and substantive charges, the trial court ordered that the petitioners each pay one-third of the costs of prosecution of the four consolidated cases. Determination of the amounts was, however, not made on the basis of taxation of costs separately in each of the four cases. Instead, the clerk as a matter of convenience entered all costs reflecting the witness and marshal's fees in the one case in which the three petitioners were charged with conspiracy. This procedure, although achieving the correct practical result as

long as all four convictions stood, clearly became improper once the conspiracy conviction was set aside. Accordingly, the trial court took the corrective action of fixing the liability for costs individually in the substantive cases as originally intended, with allowance for the conspiracy acquittal. (R. 105.) The re-taxing of costs in the circumstances of this case was fully warranted under Rule 36 of the Federal Rules of Criminal Procedure, *supra,* which provides that clerical mistakes in judgments and orders may be corrected at any time.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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AUGUST, 1950.

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